ridge, J. But in *Coates v. Stevens*, 2 M. & R. 137, and *Kiddell v. Burnard*, 9 M. & W. 668, the rule is thus laid down by Parke, B.: "I have always considered that a man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is that if at the time of the sale the horse has any disease which either actually does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure that either does at the time, or in its ordinary effects will diminish the natural usefulness of the horse, such horse is unsound." The rule laid down by Parke, B., is now the law of England; and the law of the United States is in accord with it. Under it any disease is unsoundness, however slight and curable, if it prevents the buyer from using the animal *at once*; though "if the disease is slight the unsoundness is proportionally so, and so also ought to be the damages." Parke, B., in *Kiddell v. Burnard*, *supra*. For a full discussion of the rule as to unsoundness, and also of the various diseases and defects which are considered to amount to unsoundness, see 53 Am. Dec. 173–179, note to *Roberts v. Jenkins*, 21 N. H. 116; Benj. on Sales, sec. 619–20; 2 Schoul. Pers. Prop., secs. 339–341, and notes.

TITLE BY CONFUSION.—This doctrine applies when one owner of goods (solid or liquid) so mixes them with the goods of another that the identity of the respective goods is lost in the mass. The rule then is that if the commingling was *wilful* or *wrongful*, and the goods are of unequal value, the innocent party whose goods have thus been *confused*, will have title to the whole mass. 2 Bl. Com. (405); Pattee's Cases on Personalty, 145. Thus in *Beach v. Schmultz*, 20 Ill. 186, where lumber consisting of different kinds and qualities had been confused, so as to be incapable of identification, it was said by the court: "Gray then having wrongfully produced this confusion [of his lumber with that of Schmultz] by an unauthorized intermixture, necessarily forfeits his right to the whole, and the plaintiffs in error, his creditors, can have no right or claim to levy an attachment upon it. The court could not do otherwise than find for Schmultz, the defendant in error, that it was his property." And in "The Idaho," 93 U. S. 575, 585, it is said: "All the authorities agree that if a man wilfully and wrongfully mixes his own goods with those of another, so as to render them undistinguishable, he will not be entitled to his proportion, nor to any part of the property. Certainly not unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so if the wrong-doer confounds his own goods with those he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

But in order to have a case of "confusion" at all, it is indispensable that the identity of the goods should be lost in the mass so as to be no longer distinguishable. Thus there would be no occasion for the doctrine of confusion if herds of cattle driven together had different brands, or bales or boxes distinct marks of ownership; for, in the language of Schouler (2 Schoul. Pers. Prop. sec. 43): "So

long as one can identify his own chattels, and take them away, the ownership of articles need suffer no change, because all happen to be lumped into one lot." And as to the doctrine above as to forfeiture by wilful commingling, this does not apply if the goods wrongfully intermingled were *of equal value;* for in that case the wrong-doer is still entitled to his share of the mixture if he can prove the quantity of his own goods put into the mass. See *Hesseltine v. Stockwell*, 30 Me. 237 (50 Am. Dec. 627); *Lupton v. White*, 15 Ves. 432; The Idaho, 93 U. S. 586.

The doctrine of "comparative values," so important in the law of accession, (see 2 Va. Law Reg. 63) has, it is said, no application to the confusion of goods, and this may sometimes lead to a somewhat remarkable result. Thus the case is put, where A empties B's bottle of wine, wilfully, into a hogshead of wine belonging to A, of a different quality from that in B's bottle, and the question is asked, does A thereby forfeit his whole hogshead of wine to B? Schouler says that this seems to be the rule, if precedents are followed, but adds that it visits a heavy penalty upon slight misconduct, and suggests that, should the question arise, the courts might perhaps escape the conclusion. 2 Schoul. Pers. Prop., sec. 47, note 2. And in Pattee's Cases on Personalty, p. 148, this case is put with a query: "If the owner of a tank of oil on a railroad car should wilfully empty a quart can of another's oil of unequal value therein, would the owner of the quart of oil thereby gain title to all in the tank?"

So far we have considered a wilful intermixture. But the commingling may be by mistake, by accident, or by the wrongful act of a third person, without fault on the part of either owner. In this case, the rule is that the two owners become tenants in common of the mass, in proportion to their respective interests. Thus in *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39, (s. c. Pattee's Cases on Personalty, 141) where cordwood of two owners was so intermingled by a freshet as to be undistinguishable, it was held that they became tenants in common of the wood, each being entitled to the number of cords of which he was owner before the confusion of the wood. And in *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 426, where the marks on bales of cotton were obliterated by sea water so that none of them could be identified as belonging to any particular consignee, it was held that the doctrine of confusion applied, and that all the owners became tenants in common of the cotton.